No. 14,593

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN WILSON, LEONARD WHITE, PAUL BOGOVICH, and ELIZABETH TINTORRI,
Appellants,

vs.

B. L. KENNEDY, FORD Q. ELVIDGE, HOWARD D. PORTER, and RICHARD F. TAITANO,
Appellees.

Appeal from the Judgment of the District Court of Guam.
Civil Case No. 27-54.

BRIEF OF APPELLEES.

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Civil Case No. 27-54.

BRIEF OF APPELLEES.

REPORT CITATION OF OPINION BELOW.

The opinion of the District Court of Guam from which this appeal is taken (R. 71-77) is reported in 123 F. Supp. 156.

JURISDICTION.

This case was instituted by a complaint filed in the District Court of Guam seeking a money judgment

against the appellees—the defendants below—for income taxes paid to the Government of Guam under Section 31 of the Organic Act of Guam, Act of August 1, 1950, c. 512, Section 31, 64 Stat. 383, 392, 48 U.S.C., Section 1421i, an injunction against further enforcement of the tax, and a declaratory judgment.

The District Court of Guam is the court of general jurisdiction for the Unincorporated Territory of Guam. Section 22 of the Organic Act of Guam, Act of August 1, 1950, c. 512, Section 22, 64 Stat. 383, 389, 48 U.S.C., Section 1424.

The District Court of Guam entered a summary judgment in favor of the defendants, from which appellants—the plaintiffs below—have taken this appeal.

Jurisdiction is conferred on this Court by 28 U.S.C., Sections 1291 and 1294, as amended by the Act of October 31, 1951, c. 655, Sections 48 and 50(a), 65 Stat. 710, 726, 727.

HISTORY.

This is an appeal from the judgment of the District Court of Guam entering a summary judgment in favor of the defendants-appellees.

The complaint was filed in the District Court against four officials of the Government of the Territory of Guam, as individuals, the former Commissioner of Revenue and Taxation, the Governor, the Attorney General, and the Director of Finance, to

recover income taxes for the years 1951, 1952, and 1953, collected pursuant to Section 31 of the Organic Act of Guam, 48 U.S.C., Section 1421i, to secure an injunction against further enforcement of the tax by the defendants, and to obtain a declaratory judgment that Section 31 of the Organic Act does not create a separate territorial income tax.

Instead of answering, defendants filed a motion to dismiss and for summary judgment.

Plaintiffs countered with a request for admissions of fact and a cross-motion for summary judgment.

After hearing and argument, the District Court granted defendants' motion for summary judgment.

Plaintiffs have appealed.

STATEMENT OF THE CASE.

The purpose of this case is to secure the overruling of the decision in *Laguana v. Ansell,* 102 F. Supp. 919, affirmed by this Court, 212 F. 2d 207, writ of certiorari denied, 348 U.S. 830, 75 S. Ct. 51, 99 L. Ed. 32.

The *Laguana* case holds that Section 31 of the Organic Act of Guam, 48 U.S.C., Section 1421i, 64 Stat. 383, 392, in providing that

> "The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam,"

creates a separate territorial income tax to be enforced by the territorial government of Guam. The tax had been so enforced since its effective date[1] relying on a 1951 United States Treasury ruling.[2]

To attack the *Laguana* decision two types of taxpayers have joined in the complaint (R. 3-13). Plaintiffs Wilson and White are employees of Brown-Pacific-Maxon, a contracting firm doing business in Guam, and seek a judgment for the taxes withheld by their employer from their wages during the years 1951, 1952 and 1953 and paid over allegedly to the defendants (R. 11). Plaintiffs Bogovich and Tintorri, as employers during the period 1951 to 1953, withheld income taxes from various unnamed employees in amounts not specified, and paid the same over allegedly to the defendants. They now ask that a refund be made of these amounts to such employees (R. 11). In all cases the sums so paid were actually paid into the Treasury of the Government of Guam in the regular collection of taxes by tax officials (R. 15-17, 66-69).

In addition to the personal judgment against the defendants in favor of plaintiffs Wilson and White, and the refund to the employees of plaintiffs Bogovich and Tintorri, plaintiffs ask in the complaint an injunction against enforcement of the territorial in-

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[1]Effective as of January 1, 1951 by provisions of Executive Order No. 10,211, February 6, 1951, 48 U.S.C.A., 1421i, Note, 16 F.R. 1167. See *Laguana v. Ansell,* 102 F. Supp. 919, 920.

[2]I. T. 4046, 1951, 1 Cum. Bull. See *Laguana v. Ansell,* supra, at p. 922 of 102 F. Supp.

come tax and a declaratory judgment that, among other points, Section 31 of the Organic Act of Guam does not create a separate territorial income tax and no officer of the government of Guam is authorized to collect any territorial income tax (R. 12).

The defendants, appellees in this Court, are as follows:

B. L. Kennedy, Commissioner of Revenue and Taxation, Government of Guam, March 27, 1953 to April 28, 1954;

Richard Taitano, Director of Finance, Government of Guam, May 14, 1952 to date;

Ford Q. Elvidge, Governor of Guam, April 23, 1953 to date;

Howard D. Porter, Attorney General of Guam, August 31, 1953 to date (R. 66, 70).

Although these defendants have been sued as individuals, the acts performed by them which constitute the alleged cause of action set forth in the complaint consist of nothing more than the enforcement in their official capacities of Section 31 of the Organic Act of Guam on the theory that it creates a separate territorial income tax.

Though plaintiffs use throughout the complaint the terms "coerce," "threaten" and "illegal" in describing the activities of the defendants, no facts are stated, as distinguished from legal conclusions, indicating any act which would be improper or illegal if done pursuant to a separate territorial income tax law. There are no allegations of negligence or malice.

Plaintiffs expressly allege that the taxes collected have been disposed of for the "benefit and use of the unincorporated territory of Guam." (R. 6, 7). It was also so conceded at the hearing (R. 94, 110).

On June 9, 1954 defendants filed a motion to dismiss and for summary judgment (R. 14), together with affidavits by defendant Elvidge and defendant Taitano in support thereof (R. 15-17).

Before the motion came up for hearing, plaintiffs filed identical requests for admissions of fact against each defendant on July 20, 1954 (R. 19-49), consisting of 109 alleged statements of fact, many of which have numerous sub-statements so that the total number is actually 357.

Also on July 20, 1954 plaintiffs gave notice that they would file a cross-motion for summary judgment (R. 50).

Defendants filed identical replies to the separate requests for admissions of fact on August 26, 1954 (R. 66-70), and at the same time identical objections to most of the requests (R. 59-65). Hearing on the objections was set for August 27, 1954 at 9:30 a.m., the same time as the hearing on the motion of defendants and cross-motion of plaintiffs (R. 70a).

At the hearing on August 27, 1954 the District Court overruled defendants' motion to dismiss (R. 111, 117) and took under advisement the motions for summary judgment (R. 115, 117). The minute entry of the clerk does not show a ruling on defendants' objections to the requests for admissions (R. 117), but

the remarks of the Court from the bench (R. 110) would indicate a disposition favorable to defendants:

> "Now as to all these questions—I, of course, read the questions in the beginning. I do not agree with the plaintiffs, the nature of the questions or that they are proper."

The District Court filed its opinion on August 31, 1954 (R. 71-77; also reported in 123 F. Supp. 156). The opinion follows the prior holding in the *Laguana* case that Section 31 of the Organic Act of Guam imposes a territorial income tax to be collected by the proper officials of the Government of Guam (R. 74). The Court summarizes its own holdings (R. 77, 123 F. Supp. at pages 159-160) as follows:

> "1. Section 31 of the Organic Act of Guam imposes a territorial income tax to be paid to and collected by the proper officials of the Government of Guam.
>
> "2. The Director of Finance is authorized as the tax collector in Guam to enforce and receive such taxes by himself or his appointees.
>
> "3. The tax to be paid ordinarily is measured by the amount of income tax the taxpayer would be required to pay to the United States of America if the taxpayer were residing in the continental United States or its incorporated territories.
>
> "4. The applicable provisions in the United States Revenue Code to enforce the payment of the territorial income tax are 'income tax laws' within the meaning of Section 31 and are available to the Director of Finance or to those author-

ized by him, subject to those non-substantive changes in nomenclature as are necessary to avoid confusion as to the taxing jurisdiction involved."

QUESTIONS PRESENTED.

The questions presented are:

1. Whether the *Laguana* case, holding that Section 31 of the Organic Act of Guam imposes a territorial income tax, to be collected by the proper officials of the Government of Guam, should be overruled. This is the basic, fundamental question.

2. Whether the District Court erred in following the *Laguana* case and holding that Section 31 of the Organic Act of Guam imposes a territorial income tax to be paid to the proper officials of the Government of Guam.

3. Whether there is any constitutional issue presented on which plaintiffs are entitled to relief.

4. Whether the District Court erred in holding that the defendants, officials of the Government of Guam, particularly defendant Taitano as Director of Finance, and defendant Kennedy as Commissioner of Revenue and Taxation, are properly authorized to enforce the territorial income tax imposed by Section 31 of the Organic Act.

5. Whether the District Court erred in granting defendants' motion for summary judgment.

STATUTES AND RULES INVOLVED.

Organic Act of Guam, C. 512, 64 Stat. 383:

Section 6(b). "The Governor shall have general supervision and control of all executive agencies and instrumentalities of the government of Guam. He shall faithfully execute the laws of the United States applicable to Guam, and the laws of Guam. He may grant pardons and reprieves and remit fines and forfeitures for offenses against the local laws, and may grant respites for all offenses against the applicable laws of the United States until the decision of the President can be ascertained. He may veto any legislation as provided in this Act. He shall commission all officers that he may be authorized to appoint. He may call upon the commanders of the armed forces of the United States in Guam, or summon the posse comitatus, or call out the militia to prevent or suppress violence, insurrection, or rebellion; and he may, in case of rebellion, invasion or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place Guam, or any part thereof, under martial law until communication can be had with the President and the President's decision thereon communicated to the Governor. He shall annually, and at such other times as the President or the Congress may require, make official report of the transactions of the government of Guam to the head of the department or agency designated by the President under section 3 of this Act, and his said annual report shall be transmitted by such department or agency to the Congress. He shall perform such additional duties and functions as may, in pursuance of law, be

delegated to him by the President, or by the department or agency. He shall have the power to issue executive regulations not in conflict with any applicable law. The Governor may submit such recommendations for the enactment of legislation to the legislature as he shall consider to be in the people's interest." (48 U.S.C. 1952 Ed., Sec. 1422(b).)

Section 9(b). "The Governor may appoint or remove any officer whose appointment or removal is not otherwise provided for. All officers shall have such powers and duties as may be conferred or imposed on them by law or by executive regulation of the Governor not inconsistent with any law." (48 U.S.C. 1952 Ed., Sec. 1422c(b).)

Section 30. "All customs duties and Federal income taxes derived from Guam, the proceeds of all taxes collected under the internal-revenue laws of the United States on articles produced in Guam and transported to the United States, its Territories, or possessions, or consumed in Guam, and the proceeds of any other taxes which may be levied by the Congress on the inhabitants of Guam, and all quarantine, passport, immigration, and naturalization fees collected in Guam shall be covered into the treasury of Guam and held in account for the government of Guam, and shall be expended for the benefit and government of Guam in accordance with the annual budgets." (48 U.S.C. 1952 Ed., Sec. 1421h.)

Section 31. "The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam." (48 U.S.C. 1952 Ed., Sec. 1421i.)

Internal Revenue Code of 1939, c. 2, 53 Stat., Part I:

Section 3653(a). "TAX.—Except as provided in sections 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." (26 U.S.C. 1952 Ed., Sec. 3653 (a).)

Section 3772. Suits for Refund.

"(a) LIMITATION.—

"(1) CLAIM.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

"(2) TIME.—No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates.

"(3) RECONSIDERATION AFTER MAILING OF NOTICE.—Any consideration, reconsideration, or action by the Commissioner with respect to such claim following the mailing of a

notice by registered mail of disallowance shall not operate to extend the period within which suit may be begun. This paragraph shall not operate (a) to bar a suit or proceeding in respect of a claim reopened prior to June 22, 1936, if such suit or proceeding was not barred under the law in effect prior to that date, or (b) to prevent the suspension of the statute of limitations for filing suit under section 3774(b) (2)." (26 U.S.C. 1952 Ed., Sec. 3772(a).)

Title 28 U.S.C. 1952 ed., Sec. 2201:

Section 2201. "CREATION OF REMEDY. In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964, amended May 24, 1949, c. 139, Section 111, 63 Stat. 105."

Federal Rules of Civil Procedure:

Rule 36. "Admission of Facts and of Genuineness of Documents.

"(a) Request for Admission. After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. If

a plaintiff desires to serve a request within 10 days after commencement of the action, leave of court, granted with or without notice, must be obtained. Copies of the documents shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder. As amended Dec. 27, 1946, effective March 19, 1948.

"(b) Effect of Admission. Any admission made by a party pursuant to such request is for the purpose of the pending action only and

neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding."

Rule 56. "Summary Judgment.

"(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, effective March 19, 1948.

"(b) For Defending Party. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

"(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, effective March 19, 1948."

Rules of the United States Court of Appeals for the Ninth Circuit:

> Rule 35. "Cases Involving Constitutional Question Where United States is not a Party. Notice to Court and to Attorney General. It shall be the duty of counsel who challenges the constitutionality of any Act of Congress affecting the public interest in any suit or proceeding in this court to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record to give immediate notice in writing to this court of the existence of said question, specifying the section of the statute to be construed. In all such cases the clerk of this court shall certify such fact to the Attorney General. (See 28 U.S.C. Sec. 2403.)"

SUMMARY OF ARGUMENT.

The District Court properly entered summary judgment for defendants on the basis of the prior *Laguana* decision.

The opinion of the District Court in the *Laguana* case, affirmed by this Court, holds that Section 31 of the Organic Act of Guam imposes a separate territorial income tax to be enforced by the proper officials of the Government of Guam.

In the present case the basic issue, therefore, is whether the *Laguana* decision should be followed or overruled on the basis of the facts presented.

Plaintiff Wilson and plaintiff White are seeking a refund of the taxes withheld from their wages by their employer, Brown-Pacific-Maxon, and paid to the Government of Guam. Plaintiff Bogovich and plaintiff Tintorri, who operate a business together, are asking that a refund be made to all their employees for taxes which they have withheld from such employees and paid to the Government of Guam. Neither the amount of such withholdings by these plaintiffs, nor the identity of their employees, is stated.

The ruling in the *Laguana* case is in point with regard to both classes of plaintiffs, since the *Laguana* case also involves the legality of the withholding of income tax from Laguana's pay by his employer. The decision holds that the withholding from Laguana's pay, and the payment thereof to the Government of Guam, was proper.

The contention of the plaintiffs that Section 31 of the Organic Act of Guam does not create a separate territorial income tax would reduce Section 31 to a complete nullity. As pointed out in the *Laguana* decision, the income tax laws have long applied to Guam, but the exemptions provided by Section 251 of the Internal Revenue Code of 1939 and earlier versions thereof had resulted in no taxes being paid on the bulk of all income earned in Guam. The express intent of Congress in enacting Section 31 was to tax this hitherto untaxed income.

The authority to enforce the separate territorial income tax created by Section 31 of the Organic Act

is in the Governor of Guam by his authority and responsibility under the Organic Act, Section 6(b), to enforce the laws of Guam and United States laws applicable to Guam. To aid him in the performance of his duties as the chief law enforcement officer of the Government of Guam, he can, of course, delegate to his subordinates. This is further evidenced by Section 9(b) of the Organic Act. Since the territorial income tax has been in effect, the actual enforcement thereof has been in the Department of Finance under the Director of Finance who in turn supervises his own subordinate, the Commissioner of Revenue and Taxation, in the enforcement of the income tax law.

Any local statutory implementation by the legislature of Guam is unnecessary, assuming Section 31 creates a separate territorial income tax. Congress has not seen fit to provide, expressly, that enforcement of the tax shall be dependent upon any local legislation. To read such a condition into the Organic Act would in effect put the legislature of Guam in the position of being able to frustrate the intent of Congress to impose a tax on income earned in Guam. In other words the legislature of Guam could veto a tax imposed upon Guam by Act of Congress by its refusal to provide the necessary implementation.

There is no constitutional issue present on which plaintiffs can base a claim for reversal. No facts are shown indicating any denial of due process since plaintiffs do not claim any discrimination or that the taxes collected from them for which refund is sought

are in excess of what they would pay in the United States. Nor have plaintiffs shown where there is any vagueness or lack of standards and how these plaintiffs have been harmed thereby.

The separate tax does not constitute an unconstitutional delegation of legislative powers, and in any event, the plenary powers of Congress with respect to government of territories and possessions would not preclude a vesting of legislative power in the executive branch of the government of a territory or possession.

The granting of the defendants' motion for summary judgment under Rule 56, and the denial of plaintiffs' cross motion, was proper and within the sound discretion of the District Court.

A summary judgment may be granted when there is no genuine issue as to any material fact. In filing the motion directed to the complaint of the plaintiffs, the defendants admitted for the sake of the motion all facts well pleaded in the complaint. No admission, of course, is made by such a motion with regard to conclusions of law that may be in a complaint. In the present complaint, such conclusions of law are numerous and generally state that Section 31 does not provide a separate territorial income tax, that there are no officials in the Government of Guam authorized to enforce the tax imposed by Section 31, that the defendants have no such authority, that the acts of the defendants in enforcing the tax are illegal, that the defendants coerced and threatened the plaintiffs

to pay the tax, and that actually the defendants are mere usurpers of the lawful authority of the United States tax officials.

It is obvious that these statements are not facts, but conclusions of law to be determined by the Court. Consequently, they are not admitted by the defendants in filing their motion.

The voluminous request for admission of facts filed by the plaintiffs, totalling in all some 357 items, including the sub-items, are similarly largely conclusions of law, or irrelevancies, or both. The defendants properly acknowledged certain factual items either entirely or in part with qualifications. As to the others, objections were duly filed and properly sustained.

The Director of Finance and his subordinate, the Commissioner of Revenue and Taxation, in enforcing the separate territorial income tax have the authority to make use of the various enforcement procedures in the United States Internal Revenue Code.

Since there is a separate territorial income tax, no suit can be maintained for a refund of any taxes paid unless a claim is first presented to the proper authorities, as indicated by Section 3772 of the Internal Revenue Code of 1939.

In addition the District Court has no jurisdiction to entertain any suit for an injunction against the enforcement of the tax, as indicated by Section 3653 of the Internal Revenue Code of 1939, nor for a declaratory judgment.

The purpose of this lawsuit is to seek a decision overruling the *Laguana* decision and in effect asks for an interpretation of Section 31 of the Organic Act of Guam which would completely frustrate the intent of the Congress of the United States to impose, as a separate territorial tax, the income tax laws of the United States on income earned in Guam.

ARGUMENT.

I.

THE BASIC QUESTION IN THIS CASE, WHETHER SECTION 31 OF THE ORGANIC ACT CREATES A SEPARATE TERRITORIAL INCOME TAX, HAS ALREADY BEEN DECIDED BY THIS COURT IN LAGUANA v. ANSELL IN FAVOR OF DEFENDANTS.

Section 31 of the Organic Act states:

> "Section 31. The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam."

The contention of the plaintiffs is that Section 31 of the Organic Act does not create a separate territorial income tax for the territory of Guam and that consequently the defendants have no authority to collect any such tax.

This basic legal issue of the case has already been ruled upon by this Court in *Laguana v. Ansell,* 102 F. Supp. 919, affirmed by this Court, 212 F. 2d 207, writ of certiorari denied, 348 U.S. 830, 75 S. Ct. 51, 99 L. Ed. 32.

In the *Laguana* case plaintiff Laguana sued defendant Ansell, the Acting Tax Commissioner and Acting Treasurer of the Government of Guam, for a refund of the tax withheld from his wages by his employer and paid into the Treasury of Guam.

The factual situation is thus identical with that of plaintiff Wilson and plaintiff White in the present appeal, who are suing the defendants for the amount of tax withheld from their wages by their employer, Brown-Pacific-Maxon, and paid into the Treasury of Guam.

The opinion of the District Court in the *Laguana* case, 102 F. Supp. 919, 920, states:

> "The position taken by the taxpayer is that Sec. 31 made applicable to Guam the Federal income-tax laws as such, including any provisions granting exemptions from taxation on income derived from sources within possessions of the United States, 26 U.S.C.A. Sections 251 and 252.
>
> "The position taken by the governments is that the effect of Sec. 31 is to set up a separate income-tax system for Guam which is a duplicate of the Federal income-tax system; that the United States Congress in exercising its authority to legislate for the unincorporated territories and possessions has established a separate and distinct taxing jurisdiction which contemplates collection of the tax by territorial officials for the use and benefit of the inhabitants of the territory; that in the alternative the taxpayer cannot be heard to complain in the instant case as the tax was owing and reached the eventual source for which it was intended.

"It seems to me that it is little more than vagrant intellectual exercise to assume that in these days of great challenge the United States Congress intended by Sec. 31 to do less than impose the full burden of income taxation, measured by the Federal tax, in this unincorporated territory. Even the very limited discussion indicates that the Congress was fully aware of the fact that it was taxing those who may have previously come within one or more of the exemptions in 26 U.S.C.A. Sections 251 and 252.

"The United States Treasury Department has construed Sec. 31 as establishing a territorial tax to be administered by the officials of the Guam government and the United States supports that holding. 1951-6-13559, I.T. 4046. The taxpayer has therefore complied with the instructions of both governments in meeting his tax liability and his tax has covered into the treasury of Guam. He cannot now be heard to say that the tax should be returned to him in order that it be paid to the United States and returned to the Guam treasury from which it was taken. The case of *Stone v. White,* 301 U.S. 532, 57 S. Ct. 851, 81 L. Ed. 1265, disposes of any such contention.

"The question remains as to whether Sec. 31 imposes a Federal tax to be collected by the United States or a territorial tax to be collected by the Government of Guam.

. . .

"As the governments point out, however, in those instances when Congress has made the income-tax laws in force in the United States ap-

plicable to possessions it has in the two major instances of the Philippines and Puerto Rico directed that such tax was to be collected by the territorial governments; and the courts have held that the effect of such legislation was to levy a territorial tax. Lawrence v. Wardell, 9 Cir., 273 F. 406; Robinette v. Commissioner of Internal Revenue, 6 Cir., 139 F. 2d 285. Later both the Philippines and Puerto Rico were given authority to adopt their own income-tax laws.

"The Naval Appropriations Act of 1921, 42 Stat. 122, 123, contained the following proviso: 'That the income tax laws now in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in the Virgin Islands of the United States, *except that the proceeds of such taxes shall be paid into the treasuries of said islands.*' (Italics supplied.)

"It does not appear that this proviso has been the subject of reported litigation but the United States Treasury construed it in its opinion I.T. 2946 (C.B. X14-2, 109 (1935)) as establishing separate and distinct taxing jurisdictions although their income-tax laws arose from an identical statute applicable to each. In its opinion I.T. 4046, 1951-6-13559 is similarly construed Sec. 31, supra, as establishing a separate territorial tax in Guam and that Section 251(a) of the Internal Revenue Code is applicable insofar as taxes due the United States are involved.

"Regardless of my initial view that Sec. 31 imposed a Federal tax to be collected by the United States, I believe that I shall add to any existing confusion by persisting in that view in

> the light of the position taken by the governments involved and my conviction that in any event a tax is imposed. I hold that the effect of Sec. 31 is to impose a territorial tax to be collected by the proper officials of the Government of Guam."

This Court affirmed the decision of the District Court, 212 F. 2d 207, by stating:

> "PER CURIAM.
>
> "For the reasons given in the Court's opinion filed February 29, 1952, 102 F. Supp. 919, the judgment is affirmed."

Plaintiffs do not expressly ask that Laguana be overruled but attempt to limit its application by saying that the District Court misconstrued its own opinion (Plaintiffs' Brief, 72), and that the opinion only holds the complaint does not state a claim on which relief could be granted and all else is dicta (Plaintiffs' Brief, 32-33, 72).

But the fact that Laguana's complaint did not state a claim upon which relief could be granted is the heart of the matter. His complaint failed for a very good reason—he was asking for a refund of his tax from an official of the Government of Guam on the erroneous ground that Section 31 did not create a separate territorial tax and hence defendant Ansell had no authority to collect it. The District Court held that this theory of the law was improper and ruled against him and this Court affirmed the decision.

Plaintiffs' brief belabors at length the point (Plaintiffs' Brief, 55-63) that the "major vice of the

entire position of the Government" is I.T. 4046 (Plaintiffs' Brief, 55). Much stress is laid on the scant respect that is due such an Income Tax Unit Ruling. Many cases are quoted (Plaintiffs' Brief, 58-63) to the effect that Internal Revenue regulations and rulings must be consistent with statutory authority.

It is submitted, however, that this argument does not prove plaintiffs' contentions. The cold fact remains that it is not I.T. 4046 which is the precedent governing this case, but the decision of the District Court and this Court in the *Laguana* case.

Plaintiffs in arguing for their own interpretation of Section 31, namely, that the United States income tax laws are to be in effect in Guam and be enforced by officials of the United States, state this is a "practicable, workable system" (Plaintiffs' Brief, 70), and "a complete system of income taxation" (Plaintiffs' Brief, 71), whereas the tax as it is presently being enforced with the sanction of the *Laguana* decision is a result of "reading into the United States statutes and the statutes of Guam that which neither the Congress nor the (Guam) legislature saw fit to put there." (Plaintiffs' Brief, 63.)

Plaintiffs fail to mention that their interpretation of Section 31 would reduce it to a legislative nonentity. It would merely be a declaration of existing law. The income tax laws of the United States, as a United States tax, applied to Guam long before Section 31 was enacted. However, with regard to income earned in Guam an exemption was provided

by Section 251 of the United States Internal Revenue Code of 1939,[3] as is pointed out in the *Laguana* opinion. The purpose of Section 31 of the Organic Act, as shown in the legislative history recited in the *Laguana* opinion, was to tax this income which was previously exempt from the United States income tax by virtue of Section 251. Yet plaintiffs are in effect saying that this purpose was not accomplished by Section 31, that Section 31 was a futile gesture and did not accomplish the intent of Congress, and that it merely was declarative of existing law.

Plaintiffs' references to what the Guam legislature saw fit to enact (Plaintiffs' Brief, 63) and to the alleged "admission" by defendants' counsel that there has been no legislation enacted by the Government of Guam with reference to the territorial income tax (Plaintiffs' Brief, 28, 29, 53) are equally without merit.

As stated in the *Laguana* opinion, 102 F. Supp. 919, 921:

> "When the Congress imposes a tax of this nature it intends that it shall be collected."

Accordingly, the tax as enacted must have been intended by Congress to be complete in itself, ready to be enforced by the executive authorities of Guam. It cannot be presumed Congress intended to create a vacuum—impose a tax but say no one is authorized to collect it. Consequently, no action by the Guam legislature was necessary to put the tax into effect.

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[3]Section 931, Internal Revenue Code of 1954.

Nor could any action by the Guam legislature repeal the tax so imposed or preclude its enforcement.

If Congress desired to withhold the enforcement of Section 31 as a separate territorial income tax until implementing legislation by the Guam legislature was enacted,[4] it could have done so. In the absence of any express limitation, no such condition can be assumed. Otherwise the Guam legislature would have a veto over the power of Congress to enact a tax for Guam. The express intent of Congress with regard to Section 31 would thereby be frustrated.

II.

PLAINTIFFS' CONTENTION THAT THERE ARE NO VALID TAX ENFORCEMENT AUTHORITIES IN THE GOVERNMENT OF GUAM IS UNWARRANTED.

Throughout plaintiffs' complaint, requests for admissions of fact and brief, the contention is repeatedly made that the defendants have no authority to enforce the tax imposed by Section 31 of the Organic Act.

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[4]An example of where Congress enacted a tax statute for a possession and specifically gave the local government authority to implement it is contained in *Ricardo v. Ambrose,* 211 F. 2d 212, involving a Virgin Islands real estate tax, 49 Stat. 1372, 48 U.S.C.A., Sections 1401-1401e. It is also interesting to note that the Virgin Islands, which has had the same type of income tax law as Guam, Act of July 12, 1921, c. 44, Sec. 1, 42 Stat. 123, 48 U.S.C. 1952 Ed. Sec. 1397, has apparently never implemented the Federal statute by local legislation. Letter, Governor of Virgin Islands to Director, Office of Territories, Department of the Interior, November 16, 1954; letter, United States Attorney, Virgin Islands, to Acting Attorney General, June 3, 1954. (Reproduced in Appendix to Defendants' Brief.)

This claim, however, is based primarily on the erroneous theory that Section 31 does not create a separate territorial income tax but instead is merely declarative of the fact that the United States income tax applies in Guam as a Federal tax. Hence the defendants are alleged in the complaint to have "usurped" the duties and authority of the Commissioner of Internal Revenue of the United States (R. 8).

Once the correctness of the decision in the *Laguana* case is conceded, namely, that Section 31 creates a separate territorial tax to be enforced by the officials of the Government of Guam, the issue as to lack of authority and the consequent alleged illegality of the defendants' enforcement activities necessarily fails.

Nowhere do the plaintiffs expressly allege or claim that, granting for the sake of argument that Section 31 does create a separate territorial tax, the defendants are still not authorized to enforce it.

The authority to enforce the separate territorial income tax created by Section 31 of the Organic Act is also contained in the Organic Act, Section 6(b), 48 U.S.C., Section 1422(b), which provides:

> "The Governor shall have general supervision and control of all executive agencies and instrumentalities of the government of Guam. He shall faithfully execute the laws of the United States applicable to Guam, and the laws of Guam . . ."

Section 31 and the entire Organic Act is, in the broad sense, a law of the United States "applicable to Guam." Further, in creating a separate territorial income tax, Congress by Section 31 has enacted a local

law for Guam under its power to legislate directly for territories and possessions. In this sense the territorial income tax is a "law of Guam":

First National Bank v. Yankton (1880) 101 U.S. 789, 25 L. Ed. 1046;

United States v. Pridgeon (1894) 153 U.S. 48, 14 S. Ct. 746, 38 L. Ed. 631;

Ex Parte Krause (DC ND Wash., 1915) 228 F. 547;

United States v. Sloan (DC Mont., 1945) 61 F. Supp. 439;

United States v. Wright (DC Hawaii, 1954) 15 F.R.D. 184.

The Governor of Guam, in carrying out his duties to enforce the law, can unquestionably delegate to other officials and subordinates of the executive branch of the government.

This authority is recognized in the Organic Act, Section 9(b), 48 U.S.C., Section 1422c(b):

> "The Governor may appoint or remove any officer whose appointment or removal is not otherwise provided for. All officers shall have such powers and duties as may be conferred or imposed on them by law or by executive regulation of the Governor not inconsistent with any law."

Since the inception of the separate territorial income tax under Section 31 of the Organic Act, its enforcement has been delegated to the Director of Finance. Affidavits of defendant Elvidge (R. 15-16) and defendant Taitano (R. 16-17). Within the De-

partment of Finance, enforcement of the income tax has been the primary duty of the Commissioner of Revenue and Taxation. Affidavit of defendant Taitano (R. 16-17).

The plaintiffs contend that the only authorized functions of the Commissioner of Revenue and Taxation are under the Business Privilege Tax Law (Plaintiffs' Brief, 2-3, 63) and quote the pertinent provisions of that law (Plaintiffs' Brief, 20-21).

Actually the Business Privilege Tax Law, an enactment of the Guam Legislature, Title XX, Chapter 6, Government Code, Public 43, 2d Guam Legislature, July 22, 1953, is entirely irrelevant as far as the territorial income tax under Section 31 of the Organic Act is concerned. The Business Privilege Tax Law does not purport to create the position of Commissioner of Revenue and Taxation, as indicated in the very sections quoted by plaintiffs (Plaintiffs' Brief, 20-21), but recognizes it as an office already in existence. It is obviously clear that the Commissioner can and does have other duties than those given him under the Business Privilege Tax Law, and those are primarily, under the Director of Finance, the enforcement of the territorial income tax.

Plaintiffs also mention (Plaintiffs' Brief, 28, 53) the so-called "admission" by defendants' counsel in response to a query by the District Court that there are no local statutory enactments, that is enactments by the Guam legislature, authorizing any department, agency, or official of the Government of Guam to collect the territorial income tax. As previously pointed

out in Part 1 hereof, pages 26, 27, any such implementation is unnecessary, and if it were necessary it would mean that Congress, without any expression to that effect, had given the Guam Legislature a veto power over whether or not the income tax imposed by Section 31 should go into effect.

Actually, of course, as mentioned supra, the Governor has the primary authority of enforcing the income tax by virtue of Section 6(b) of the Organic Act.

III.

IT IS SUBMITTED THAT THE CONSTITUTIONAL POINTS RAISED BY PLAINTIFFS ARE WITHOUT MERIT AND DO NOT WARRANT THE OVERRULING OF LAGUANA v. ANSELL.

The constitutional points mentioned by plaintiffs (Plaintiffs' Brief, 77) with regard to the proper interpretation of Section 31 were not brought up in the *Laguana* case but may be considered here.

A. As to due process.

As far as due process is concerned the decision in the *Laguana* case disposes of the question.

There is no allegation or affidavit that the taxes collected, for which refunds are sought, are not correct in amount, or that there is any question of the liability of the plaintiffs to the Government of Guam, assuming Section 31 of the Organic Act creates a separate tax.

But since the *Laguana* decision has decided that Section 31 does create a separate tax, the question

of due process as to these plaintiffs is not in issue. The District Court was correct in so ruling at the hearing (R. 113).

Even if there were some question as to the authority of the individual defendants to collect the taxes from the plaintiffs, the fact that Section 31 creates a separate tax and that the tax so collected reached the proper destination, namely, the Government of Guam, there still would be no issue of due process raised entitling plaintiffs to a refund, under the principle of *Stone v. White* (1937), 301 U.S. 532, 57 S. Ct. 851, 81 L. Ed. 1265, cited at page 921 of the *Laguana* decision.

Similarly there is no specific allegation of "vagueness" or "lack of standards" or of how any such vagueness or lack of standards would in any way affect the amount of plaintiffs' taxes or plaintiffs' liability therefor.

So, also, with regard to plaintiffs' mention that the Government of Guam has not established a Guam Tax Court or other form of appellate review (Plaintiffs' Brief, 29, 76). This is not in issue in the present case, as the District Court ruled (R. 75), 123 F. Supp. at 159, since no question is raised as to the amount of plaintiffs' taxes or plaintiffs' liability therefor once the separate tax theory is established.

B. As to delegation of legislative powers.

Plaintiffs also assert (Plaintiffs' Brief, 77, 29-30) that the "first and foremost" constitutional question

is that of delegation or exercise of legislative powers reserved to Congress. This point is further developed in Part VIII (Plaintiffs' Brief, 73-76) with reference to the District Court's decision that in applying the United States income tax laws as a territorial tax, the term "Guam" may be read for "United States" in certain places (R. 75) and that there may be made "non-substantive changes in nomenclature as are necessary to avoid confusion as to the taxing jurisdiction involved." (R. 77.)

It is submitted that no delegation or use of legislative powers is involved here. The tax officials of the Government of Guam, in enforcing the territorial income tax, consisting as it does of the United States income-tax laws, must of necessity read the law with substituted terminology appropriate to its function as a local Guam tax law if it is to have any meaning and if the intent of Congress is to be carried out. This does not, of course, mean that the tax officials can act arbitrarily or according to their own whims and fancies. They must follow the definite standard that Congress intended that Guam taxpayers shall pay, to the Government of Guam, the same tax on income earned in Guam that taxpayers living in the United States would pay to the United States on income earned in the United States.

Plaintiffs' complaint contains a general allegation as to these matters in paragraph XII (R. 8), but no specific instances are set forth.

Even assuming Section 31 of the Organic Act entails a delegation of legislative power, would such

delegation be invalid when it is given to the executive branch of a possession?

In setting up governments for the possessions of the United States, Congress is not restricted to any specific form of government and is not necessarily obliged to follow the three-fold division of powers. Congress has plenary powers in governing possessions, *First National Bank v. Yankton,* supra. If it desires it may establish a local government with a local legislature and give such legislature local legislative authority, but Congress is not obliged to do so and if it desires, Congress may give legislative authority to some other branch of the local government.

Thus for many years the Territory of Alaska had no legislature. Guam itself, until the Organic Act was passed, was under the Department of the Navy. The Naval Governor had plenary powers—legislative and judicial as well as executive.

In establishing the territory of Oklahoma, Congress expressly vested legislative power in the governor as well as in the legislature. Act of May 2, 1890, c. 182, Sec. 4, 26 Stat. 81, 83.

At times Congress has also vested legislative powers in the judiciary, as in the District of Columbia and Territory of Alaska:

> *Keller v. Potomac Electric Power Co.* (1923) 261 U.S. 428, 442, 43 S. Ct. 445, 448, 67 L. Ed. 731;
>
> *In re Annexation of Slaterville* (DC Alaska 1949) 83 F. Supp. 661.

It is submitted that if Section 31 of the Organic Act involves any delegation of legislative power by Congress to the executive branch of the Government of Guam, it is constitutional.

Plaintiffs' reference (Plaintiffs' Brief, 30) of an "attempted delegation by the Commissioner of Internal Revenue of the United States" seems entirely irrelevant. There has been no delegation by the Commissioner with reference to Section 31.

C. Failure of plaintiffs to comply with Rule 35 of this court.

Although plaintiffs have challenged the constitutionality of Section 31 of the Organic Act, as interpreted in the *Laguana* decision, it is pointed out that they have failed to comply with Rule 35 of this Court:

> "Notice to Court and to Attorney General. It shall be the duty of counsel who challenges the constitutionality of any Act of Congress affecting the public interest in any suit or proceeding in this court to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record to give immediate notice in writing to this court of the existence of said question, specifying the section of the statute to be construed. In all such cases the clerk of this court shall certify such fact to the Attorney General. (See 28 U.S.C. Sec. 2403.)"

IV.

THE DISTRICT COURT PROPERLY GRANTED DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

A. Introductory.

Parts I, II and III of this brief are concerned with the basic issues of this appeal concerning the merits of plaintiffs' case. It has been shown that the District Court followed the *Laguana* decision in holding that Section 31 of the Organic Act of Guam imposes a separate territorial income tax to be enforced by the Government of Guam, and that the defendants, the appellees, are the proper officials charged with enforcement.

B. The District Court did not dismiss the complaint and then thereafter grant the motion for summary judgment.

Plaintiffs assert (Plaintiffs' Brief, 27, 28, 39) that the District Court first dismissed the complaint and then granted summary judgment for defendants. Their argument is "Once the complaint was dismissed, there was nothing before the court; the court had nothing upon which to act." (Plaintiffs' Brief, 39.)

Plaintiffs are under an erroneous impression. At the hearing on the motion the District Court first clearly said: "I will overrule your motion to dismiss," (R. 111), referring to defendants' motion to dismiss the complaint. Subsequently the District Court stated: "I will prepare a written opinion and will rule on the question of summary judgment since both of you have moved for summary judgment." (R. 115.) This is further shown by the minute entry of the hearing (R. 117).

C. Since there was no genuine issue as to any material fact, the District Court was correct in granting defendants' motion for summary judgment.

Rule 56, concerning the granting of a summary judgment, provides in part:

> "The judgment shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Was there any "genuine issue as to any material fact?" If not, it was proper for the District Court to dispose of the case on matters of law.

It is fundamental, of course, that by moving for dismissal and for summary judgment, defendants admit the allegations *of fact* in the complaint are true for the purposes of the motion. Conclusions of law, however, are in nowise admitted.

Thus, in *Rosenhan v. United States* (CA 10, 1942) 131 F. 2d 932, certiorari denied, 318 U.S. 790, 63 S. Ct. 993, 87 L. Ed. 1156, the Court ruled:

> "The motion for judgment on the pleadings admits all facts well pleaded, but it does not admit conclusions of law. The Government therefore admits the issuance of a certificate of airworthiness on the aircraft by the Utah State Aeronautics Commission, but it does not admit the legal conclusion that such a certificate met the requirements of the Civil Aeronautics Act, supra, requiring a certificate of airworthiness. Neither does the motion admit the affirmative defense of

> the asserted unconstitutionality of the Act as applied to the admitted intrastate operations."

However, as far as facts are concerned, as distinguished from conclusions of law, the complaint is in effect alleging that defendants have been enforcing a separate territorial income tax pursuant to Section 31 of the Organic Act. This the defendants not only admit but assert is their obligation as officials of the Government of Guam.

The complaint even alleges the official positions of the defendants with the Government of Guam (R. 4).

With regard to defendant Kennedy the complaint, however, merely states he has "been holding himself out to be the Commissioner of Revenue and Taxation of the unincorporated territory of Guam, claiming to have been duly appointed to such office pursuant to law with the power and duty to collect a territorial income tax."

It is a matter of law, as shown in Part II of defendants' brief, that the Governor has the power and duty to enforce Federal laws applicable to Guam and the laws of Guam under Section 6(a) of the Organic Act, which necessarily includes the separate territorial income tax created by Section 31. The affidavits of defendant Elvidge, the Governor of Guam (R. 15-16), and of defendant Taitano, the Director of Finance (R. 16-17), were filed in support of defendants' motion to clarify the fact that this power and duty of the Governor was being enforced through the Director of Finance and Commissioner of Revenue and Taxation.

When then is there a "*genuine* issue as to any *material* fact?"

Plaintiffs' recital of allegations (Plaintiffs' Brief, 37), which they claim are admitted as being true for the purposes of the motion, is a recital of conclusions of law:

> (a) "The complaint alleged the taxes to be illegal, the demands of defendants also illegal, T.R. 4, 5." (Plaintiffs' Brief, 37.)

Whether the tax is "illegal" is a matter of interpretation of Section 31. The "demands" apparently refer to alleged demands by defendants for payment of tax. The legality of such demands also is a question of interpreting Section 31. There is no allegation of facts that the amount of taxes paid by plaintiffs is excessive, assuming Section 31 creates a separate territorial income tax.

> (b) "That the sums collected have been converted by defendants, T.R. 7." (Plaintiffs' Brief, 37.)

This is a reference to Paragraph IX of the complaint (R. 7). Whether the collection of taxes by the defendants through normal procedures and the turning over of such funds to the Government of Guam is a "conversion" again depends upon the interpretation of Section 31 and is a question of law.

> (c) "That defendants have usurped the authorities of the Commissioner of Internal Revenue of the United States, T.R. 8, and have altered and amended the Internal Revenue Code of the United States." (Plaintiffs' Brief, 37.)

Whether the defendants are illegally enforcing a Federal tax or are rather merely administering a separate territorial income tax under Section 31 is a question of law.

> (d) "That defendants have no statutory authority, T.R. 9." (Plaintiffs' Brief, 37.)

This is apparently a reference to Paragraphs XII, XIV and XV of the complaint (R. 8, 9). This raises again only questions of law. With regard to the lack of statutory enactments by the Guam Legislature referred to in Paragraphs XIV and XV, while this is a question of law, it has also been expressly stated by defendants. There is no question here of any "admission." As pointed out in Part II of this brief, the Guam Legislature is not required to enact legislation as a condition to the enforcement of a tax imposed on Guam by the Congress of the United States.

> (e) "That plaintiffs are deprived of their property without due process of law, T.R. 10."

Again this is a conclusion of law depending on whether Section 31 creates a separate territorial income tax. No question is raised otherwise as to the correctness of the tax.

Similarly the statements (Plaintiffs' Brief, 39-40) referring to allegations of lack of authority by defendant Taitano, the Department of Finance, defendant Elvidge, and defendant Kennedy do not raise any material question of fact.

The statement (Plaintiffs' Brief, 40), "The complaint alleges illegal threats of action both civil and

criminal", again turns on the point "illegal." The allegations as to threats and coercion refer only to routine enforcement of the separate territorial income tax, the propriety of which depends upon the interpretation of Section 31, a legal question.

Part III (Plaintiffs' Brief, 42-45) is a further repetition of various allegations in the complaint and issues raised which plaintiffs assert are questions of fact but which are actually questions of law.

In Part IV (Plaintiffs' Brief, 45-49) plaintiffs argue that the District Court should have overruled the objections by the defendants to the requests for admissions of fact. The requests for admissions (R. 19-49), of which there are a total of 357 items, including the numerous sub-items, are primarily a mass of conclusions of law and irrelevancies which ask the defendants to confess judgment by admitting that there is no territorial income tax and that whatever tax is imposed by Section 31 of the Organic Act, the defendants have no authority to enforce it.

Rule 36 is clear in expressly indicating that it provides only for admissions of "*relevant* matters of *fact*" and not of law.

Rule 36 is also so interpreted in *Fidelity Trust Co. v. Village of Stickney* (CA 7, 1942) 129 F. 2d 506, where the court ruled that a request for an admission that certain village bonds which had been cancelled had not been used to pay property assessments was a request for a conclusion of law and improper. The Court pointed out at page 511 that the requested admission was a question in litigation:

> "Under the plaintiff's construction of the statute, it (payment) was unauthorized. To ask the defendant to admit the property owners had not used bonds to pay their assessments and that the cancelled bonds were not paid and cancelled, was not a request for facts but a conclusion of law, and that was the heart of the case."

In addition to the conclusions of law, a host of the requests are entirely irrelevant to the question of whether plaintiffs are entitled to judgment and refund of the taxes paid by them, as indicated in the objections filed by defendants (R. 59-65).

D. Contrary to the statement in plaintiffs' brief (Plaintiffs' Brief 46), defendants did seek a ruling on objections to request for admissions and the District Court properly sustained the objections.

Plaintiffs' assertion (Plaintiffs' Brief, 46) that defendants violated Rule 36 by not seeking a ruling on their objections to the requests for admissions of fact is not in accordance with the record.

Defendants gave notice on August 26, 1954 that a hearing would be had on the objections on August 27, 1954 in conjunction with the hearing on the motion to dismiss and for summary judgment (R. 70a).

The objections are also mentioned in the statement of defendants' counsel (R. 84) at the hearing on August 27, 1954 as to the questions before the Court.

While the Court's minute entry for the hearing (R. 117) does not give its ruling on the objections of the defendants, it is submitted they were sustained by the Court when the judge of the District Court stated (R. 110):

> "Now as to all these questions—I, of course, read the questions in the beginning. I do not agree with the plaintiffs, the nature of the questions or that they are proper."

The propriety of the District Court's ruling on the objections cannot be justifiably questioned. The bulk of the 357 items and sub-items (R. 19-49) call for conclusions of law or are entirely irrelevant as to whether the plaintiffs are entitled to the relief they request, based on the taxes paid by them.

E. It was proper for the District Court to enter summary judgment in favor of defendant Kennedy even though his reply to the request for admissions was sworn to by defendant Taitano.

It is contended (Plaintiffs' Brief, 42) that the District Court erred in entering summary judgment in favor of defendant Kennedy because his reply (R. 66-70) to plaintiffs' request for admissions of fact was not sworn to by him but by defendant Taitano.

Rule 36 does not require that the sworn statement made in response to request for admissions must be signed by the party to the action. This was specifically held in *Van Horne v. Hines, Adm'r of Veteran Affairs* (DC Dist. Col., 1940) 31 F. Supp. 346:

> "The rule does not indicate that a sworn statement when served shall be signed by the adverse party. It is considered sufficient for the purpose and spirit of the rule if such sworn statement be made by one who knows or upon information believes the truth of matters stated therein."

Defendant Richard Taitano was certainly qualified to swear to defendant Kennedy's reply since the material pertains to the operation of the Department of Finance of which he is Director. In addition defendant Taitano's reply is identical with that of defendant Kennedy's (R. 70).

V.

SINCE SECTION 31 OF THE ORGANIC ACT CREATES A SEPARATE TERRITORIAL INCOME TAX, PLAINTIFFS, NOT HAVING FILED A CLAIM FOR REFUND, FAILED TO LAY THE FOUNDATION FOR A SUIT FOR REFUND.

In their prayer plaintiff Wilson asks for a judgment for a refund of $2,613.60 and plaintiff White for a judgment for a tax refund of $2,871.20. In addition plaintiffs Bogovich and Tintorri ask for a refund of all taxes withheld by them for various unnamed employees without stating any amount (R. 11-12).

Since there is created a separate territorial income tax for Guam under Section 31 of the Organic Act, consisting of the applicable provisions of the United States income tax laws, it was necessary for plaintiffs to make a proper demand for refund before the District Court would have jurisdiction to entertain a suit for refund.

Section 3772[5] of the United States Internal Revenue Code of 1939 specified two conditions precedent before the jurisdiction of the District Court could be invoked:

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[5]Section 7422, Internal Revenue Code of 1954.

"Section 3772. Suits for refund.

(a) Limitations.

(1) Claim. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

"(2) Time. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates."

Plaintiffs have failed to allege compliance with these conditions in their complaint, and hence in any event the District Court would not have had jurisdiction to grant the judgments prayed for:

Harvey v. Early (CA 4, 1947) 160 F. 2d 836;

United States v. Felt & Tarrant Mfg. Co. (1931) 283 U.S. 269, 51 S. Ct. 376, 75 L. Ed. 1025;

Kales v. United States (CA 3, 1940) 115 F. 2d 497, affirmed (1941) 314 U.S. 186, 62 S. Ct. 214, 86 L. Ed. 132.

VI.

SINCE SECTION 31 OF THE ORGANIC ACT CREATES A SEPARATE TERRITORIAL INCOME TAX, THE DISTRICT COURT WOULD NOT HAVE JURISDICTION TO GRANT THE INJUNCTIVE RELIEF PRAYED FOR.

In their prayer plaintiffs demand that the defendants be enjoined and restrained from further illegal levy, assessment and collection of the territorial income tax (R. 12).

Since Section 31 of the Organic Act creates a separate territorial income tax for Guam, consisting of the applicable provisions of the United States income tax laws, the District Court would have no jurisdiction to grant the injunctive relief prayed for.

Section 3653[6] of the United States Internal Revenue Code of 1939, 26 U.S.C., 1952 Ed., Section 3653, provided:

> "(a) Tax. Except as provided in Sections 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

Because of this provision the District Court would not have jurisdiction to grant injunctive relief:

Harvey v. Early (CA 4, 1947) 160 F. 2d 836.

The primary purpose of this section is to prohibit suits which will interfere with assessment and collection of taxes which are necessary to the maintenance of government:

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[6]Section 7421, Internal Revenue Code of 1954.

Cadwalader v. Sturgess (CA 3, 1924) 297 F. 73;

Voss v. Hinds (DC WD Okla., 1953) 111 F. Supp. 679, affirmed (CA 10, 1953) 208 F. 2d 912.

The courts have held that Section 3653 of the 1939 Code, or its predecessors, applies where the assessment is alleged to be illegal, and even where the tax statute is alleged to be unconstitutional:

Dodge v. Osborn (1916) 240 U.S. 118, 36 S. Ct. 275, 60 L. Ed. 557;

Bailey v. George (1922) 259 U.S. 16, 42 S. Ct. 419, 66 L. Ed. 816;

Graham v. DuPont (1923) 262 U.S. 234, 43 S. Ct. 567, 67 L. Ed. 965;

Harvey v. Early (CA 4, 1947) 160 F. 2d 836;

Dyer v. Gallagher (CA 6, 1953) 203 F. 2d 477;

Robique v. Lambert (DC ED La., 1953) 114 F. Supp. 305, affirmed (CA 5, 1954) 214 F. 2d 3.

VII.

INSOFAR AS PLAINTIFFS SEEK A DECLARATORY JUDGMENT, THE DISTRICT COURT WOULD NOT HAVE JURISDICTION TO GRANT THE RELIEF PRAYED FOR.

Insofar as plaintiffs ask for a declaratory judgment (R. 12) as to the interpretation of Section 31 of the Organic Act, the District Court would not have jurisdiction by virtue of 28 U.S.C., Section 2201.

This precise point was already ruled upon in *Crain v. Government of Guam* (DC Guam, 1951) 97 F.Supp. 433, affirmed by this Court on other grounds, 195 F. 2d 414. The District Court's opinion states, at page 434:

> "The purpose of the action is to obtain a declaratory judgment to the effect that the Government of Guam has no authority to impose or collect a tax under the provisions of Sec. 31, supra, but that this section must be construed in relationship to other applicable provisions of the United States Internal Revenue Code, 26 U.S.C.A. Section 1 et seq.; that any tax imposed by Sec. 31 is the concern of the United States Government and not the Government of Guam. Even assuming that the Government of Guam had waived its immunity from suit, this court would not take jurisdiction. As was stated in Noland v. Westover, 9 Cir., 172 F. 2d 614, 615: 'The only definite relief asked is for a declaratory judgment, but the statute authorizing the district court to render a declaratory judgment does not authorize its application in controversies in respect of tax problems. 28 U.S.C.A. Section 2201; Red Star Yeast and Products Co. v. La Buddle, 7 Cir., 83 F. 2d 394; Wilson v. Wilson, 4 Cir., 141 F. 2d 599.' "

VIII.

PLAINTIFFS BOGOVICH AND TINTORRI CANNOT SUE FOR REFUND TO THEIR EMPLOYEES.

In addition to other defenses, plaintiff Bogovich and plaintiff Tintorri state no cause of action with

regard to the refund claimed on behalf of their employees.

These employees are not named in the complaint. The amount of refund claimed is not stated. There is no allegation that these unknown employees ever have objected to the withholding from their wages, or dispute the legality of the separate territorial income tax.

It would appear that these plaintiffs are in effect gratuitous interlopers.

These plaintiffs, as employers, are expressly exempted from any liability to their employees by Section 1623 of the Internal Revenue Code of 1939,[7] 26 U.S.C., 1952 ed., Section 1623:

> "The employer shall be liable for the payment of the tax required to be deducted and withheld under this subchapter, and *shall not be liable to any person for the amount of any such payment.*" (Emphasis added.)

IX.

PLAINTIFFS' POINT 12 AS TO THE CAPACITY IN WHICH DEFENDANTS HAVE BEEN SUED IS WITHOUT FOUNDATION.

In Part VI of their brief (Plaintiffs' Brief, 63-67) it is argued as Point 12 that the District Court erred in holding "that the defendants were sued in their official capacities." Plaintiffs seem to argue (Plaintiffs' Brief, 63) that this somehow results in the defense of sovereign immunity.

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[7]Section 3403, Internal Revenue Code of 1954.

Whatever impression the plaintiffs' counsel may have received at the hearing (R. 114-115), it is clearly stated in the opinion (R. 72), 123 F. Supp. 156, 158:

> "The defendants are sued as individuals, but they are the former Commissioner of Revenue and Taxation for Guam, and the present Governor, Attorney General, and Director of Finance for Guam, respectively."

In no way is the decision of the District Court based on sovereign immunity.

X.

THE DISTRICT COURT DID NOT ERR IN NOT PERMITTING PLAINTIFFS TO AMEND THEIR COMPLAINT.

The contention (Plaintiffs' Brief, 78) that the court erred in not allowing the plaintiffs to file an amended complaint is without merit.

The question arose as follows (R. 104):

> "Mr. Phelan. I doubt that the tax court would take jurisdiction of the question.
>
> The Court. But that is not before me. The only time it comes before me is when somebody wants to use that machinery and it doesn't exist. In other words, I am not at this time required to pass upon the question as to whether the Government of Guam can substitute an arbitrary administrative opinion for a judicial opinion, which the Congress of the United States authorizes and requires in connection with collections

in the United States. It seems to me that is a question which has to be raised at the proper time and proper proceedings.

Mr. Phelan. We could add an amendment to this complaint.

The Court. I have to take this complaint as it is. I have a motion for summary judgment before me. I have got your motion for summary judgment. You are through on this complaint."

Plaintiffs never submitted an amended complaint for filing, but in any event it is difficult to see how the tax court question could be raised in the present case. This is a suit for refund of taxes paid, raising the primary question of whether Section 31 of the Organic Act creates a separate territorial tax to be enforced by the proper officials of the Government of Guam. The question of whether there is a tribunal to review a tax assessment is irrelevant.

There certainly is no question of the availability of procedures to sue for refund of taxes paid. The *Laguana* case was a suit for refund.

It is submitted plaintiffs were in no way prejudiced by the ruling of the Court.

CONCLUSION.

It is submitted that the *Laguana* decision clearly governs the facts set forth in plaintiffs' complaint, and that the granting of defendants' motion for summary judgment by the District Court of Guam is

proper. It is requested that the decision of the District Court be affirmed.

Dated this 29th day of June, 1955.

Respectfully submitted,

HOWARD D. PORTER,
Attorney General of Guam,

LOUIS A. OTTO, JR.,
Deputy Attorney General of Guam,

LEON D. FLORES,
Island Attorney of Guam,

RICHARD ROSENBERRY,
Deputy Island Attorney of Guam,

Attorneys for Appellees.

(Appendix Follows.)

Appendix.

Appendix

Government of
The Virgin Islands of the United States

Charlotte Amalie, St. Thomas
November 16, 1954

Honorable William C. Strand
Director, Office of Territories
Department of the Interior
Washington 25, D. C.

Mr dear Director Strand:

This is in response to your letter of November 9, 1954, requesting certain information regarding the enforcement of the Income Tax Laws in the Virgin Islands.

In enforcing the Income Tax Laws in the Virgin Islands, we have never had to apply the criminal provisions of the Internal Revenue Code. If such action becomes necessary, our proceedings will be based on the Federal law, since we do not have any territorial laws implementing the Federal law.

Sincerely,
A. A. Alexander
Governor

United States Department of Justice

United States Attorney
Virgin Islands of the United States
Charlotte Amalie, V. I.

June 3, 1954

Honorable Louis A. Otto, Jr.
Acting Attorney General
Government of Guam
Agana, Guam

My dear Mr. Otto:

This is in reply to your letter of May 24, 1954, requesting information covering the collection of income tax in this jurisdiction under Section 1397, Title 48 U.S.C.A.

Ever since the income tax laws of the United States became applicable to the Virgin Islands they have been enforced under the provisions of the United States Internal Revenue Code. The Commissioner of Finance was designated the Collector of Internal Revenue by the Governor of the Virgin Islands and an office set up administratively to administer and collect the tax. No local legislation has been passed to implement in any way the procedure in the collection of the tax, criminal or civil. The only thing which is done locally is to set up in the annual budget a certain amount for the purpose of refunding overpayment of taxes.

It is my opinion that it would be advisable for you to operate solely under the income tax laws of the

United States than to supplement them by any local laws. I do not think any such law will improve on the Federal law and whatever is necessary to be done with respect to the establishment of an office to collect and administer the tax may be done administratively.

Hoping this information will be of service to you and with kindest regards, I am

Sincerely yours,

/s/ Cyril Michael
Cyril Michael
United States Attorney